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IN THE

Supreme Court of the United States

October Term, 1963

No. 285

In the Matter of the Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

In Relation To

LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by JOHN R. DAVISON, Esq. and WILLIAM R. BRENNAN, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1963

No.

In the Matter of the Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

In Relation To

Louis L. Friedman, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

Court on the Judiciary of the State of New York, by John R. Davison, Esq. and William R. Brennan, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

On Appeal From Court on the Judiciary of the State of New York

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JURISDICTIONAL STATEMENT

Louis L. Friedman, above named, appeals from a final order entered in the office of the Clerk of the Court on the Judiciary of the State of New York on February 22, 1963, which by a divided vote of four to two, removed appellant from his elected public office of Justice of the Supreme Court of the State of New York. The appeal is also taken from another order of said Court entered in said Clerk's office on April 3, 1963, which denied a motion made by appellant to vacate the order of removal. Appellant submits this statement to show that the Supreme Court

of the United States has jurisdiction, and that substantial and important federal constitutional questions are presented respecting federal due process.

A copy of the order of removal is Appendix A, hereto.

A copy of the order denying the motion to vacate the order of removal is Appendix B, hereto.

Opinions Below

The Court on the Judiciary filed no opinion in support of its order of removal, except in so far as formal conclusory findings are stated therein (Appendix A hereto). One previous report of the Court on Judiciary in a wholly unrelated matter was reported in a volume of the N. Y. 2d Reports, but the proceedings in the instant matter have not as yet been officially reported. A short decision was rendered by the Court on the Judiciary on the motion to vacate the removal order, and this, too, has not been officially reported. A copy of this decision is Appendix C, hereto.

An attempt to review the removal order and the order denying vacator in the Appellate Division of the Supreme Court of the State of New York, Third Department, both by way of appeal and by certiorari, was dismissed by that court on July 9, 1963, for the stated reason that said court had no power to review orders of the Court on the Judiciary. Opinion of Appellate Division is Appendix D, hereto (not yet officially reported).

Jurisdiction

The proceeding below was instituted by the Court on the Judiciary of the State of New York for the removal of appellant as a Justice of the Supreme Court, pursuant to section 9-a of Article VI of the Constitution of the State of

New York. The federal constitutional question was thus raised in appellant's answer (R., Vol. I, 6a):

> "Sixth: That the procedures for the removal for cause of a Supreme Court Justice pursuant to Article VI, Section 9-a of the Constitution of the State of New York contravene the due process clause of the Fourteenth Amendment of the Constitution of the United States inasmuch as it requires that the same body preferring the charges should hear and determine them."

Section 9-a of Article VI of the New York State Constitution, (hereinafter referred to only as section 9-a) was superseded by section 22 of said Article (hereinafter referred to only as section 22) on September 1, 1962. At the proceedings of December 10, 1962, (typewritten minutes thereof are annexed to inside front cover of R., Vol. I, immediately following copies of Notice of Appeal to this Court), the charges and the title of this proceeding were amended to refer to section 22 in place of section 9-a, and the answer, and particularly the above-quoted portion thereof, was similarly amended. At the same time, the answer was additionally amended to add the words "as to this respondent" after the word "contravene", in said above-quoted portion of said answer (see pp. 1 and 2 of said typewritten minutes).

The Court on the Judiciary of the State of New York has held section 9-a, (later amended to section 22) valid, and has dismissed the federal constitutional question raised with respect to it, by denying the motion to dismiss made by appellant on the grounds set forth in quoted paragraph "Sixth" of the answer (see proceedings of Dec. 10, 1962, annexed to R., Vol. I, pp. 2, 3, 4, 15, 18, 19, and R., Vol. IV, 1240a).

A notice of appeal from both the removal order dated February 22, 1963, and the order denying vacator dated April 3, 1963 and entered on April 18, 1963, was filed in

the office of the Clerk of the Court on the Judiciary on May 21, 1963.

The jurisdiction of this Court to review this case by direct appeal is invoked under 28 U. S. C. A., section 1257(2).

The reference in section 1257(2) to a "statute of any state" encompasses State constitutional provisions, *Torcaso* v. *Watkins*, 367 U. S. 488; *Adamson* v. *California*, 332 U. S. 46; *Railway Express Agency* v. *Virginia*, 282 U. S. 440.

The cases cited in the preceding paragraph and *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, sustain the jurisdiction of this Court on this direct appeal.

The "validity" of a State statute has been held to have been sustained within the meaning of section 1257(2), when the State court holds the statute applicable to a particular state of facts, as against the contention that such an application is invalid on federal grounds, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

Statutes Involved

Section 9-a of Article VI of the Constitution of the State of New York, which may be found in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 2, is Appendix E, hereto; and section 22, which superseded it, is Appendix F, hereto.

Questions Presented

1. Whether Article VI, section 9-a, of the New York State Constitution, in effect prior to September 1, 1962, and Article VI, section 22, of the New York State Constitution, in effect on and after September 1, 1962, are unconstitutional on the face of each of them and as applied herein,

in that they deny to appellant due process of law in violation of the Fourteenth Amendment to the United States Constitution, by authorizing the hearing and the adjudication of charges made against appellant for his removal as a duly elected Justice of the Supreme Court of the State of New York by the same tribunal which investigated, preferred and prosecuted the said charges, with the aid of their designated counsel.

2. Whether Article VI, section 9-a of the New York State Constitution, in effect prior to September 1, 1962, and Article VI, section 22, of the New York State Constitution in effect on and after September 1, 1962, are unconstitutional on the face of each of them and as applied herein, by reason of their being vague and indefinite in violation of Fourteenth Amendment due process, in so far as they purport to authorize the removal of a duly elected Justice of the Supreme Court of the State of New York, such as appellant herein, "for cause," without providing any definite rules or standards to define the meaning of that term.

3. Whether appellant was denied Fourteenth Amendment due process by depriving him of his office and emoluments as a Justice of the Supreme Court of the State of New York, by a tribunal which, when originally composed, was made up of only four members instead of the six mandated by the New York State Constitution (sec. 9a, sub. (1)); and of which four members, only one was from the Court of Appeals instead of two, as required by said section.

4. Whether appellant was denied Fourteenth Amendment due process in that he was tried on two charges not contained in the Statement of Charges served upon him; and in that the tribunal proceeded to the trial without giving the notice to the Governor and Legislature required to be given by the New York State Constitution (sec. 22, e).

Statement

Appellant was elected as a Justice of the Supreme Court of the State of New York, Second Judicial District, for a term of fourteen years (New York State Constitution, art. VI, sec. 4; now art. VI, sec. 6, c) commencing with January 1, 1957, and terminating December 31, 1970. He was the candidate of the three major political parties of the State, and was elected without opposition by more than a million votes, after having served as such a justice through appointment by the Governor of the State of New York for a period of approximately fifteen months (R., Vol. II, 1242a, 1243a; affidavit of appellant, attached to motion to vacate, p. 1).

The Charges

The charges served upon appellant, annexed hereto as Appendix G, were made after appellant had served in his judicial office for a total period of approximately seven years (Oct. 1955—Aug. 1962). They are in no way related to his judicial duties or conduct on the bench. They allege in substance that appellant obstructed a judicial inquiry of attorneys in Brooklyn, New York, directed in 1957 by the Appellate Division, Second Department, by keeping certain financial records of himself and his brother in his Judicial Chambers, and refusing to surrender them when requested to do so (Appendix G).

The proof in the case showed without contradiction, that an unlimited and full examination and inspection of all records in appellant's possession was offered to the representatives of the inquiry (R., Vol. III, 1053a-1056a), conditioned only on a reasonable arrangement to prevent publicity leaks and to retain appellant's control over those records. The difference was only where the examination should take place, and whether appellant was obliged to make complete surrender of his books and records.

Justice Gerald Nolan, Presiding Justice of the Appellate Division, Second Department at the time, submitted a statement to the Court on the Judiciary (received by consent in lieu of his testimony, Ex. 3, attached to R., Vol. IV) reading as follows:

> "I have been asked by Justice Louis L. Friedman if I could recall a conversation that I had with him in 1957 relative to the judicial inquiry then being conducted by Mr. Justice Arkwright, pursuant to an order of the Appellate Division, Second Department. I have a distinct recollection of the substance of the conversation, although I am unable to remember all the details or the precise time when the conversation took place. My best recollection is that it was in the fall of 1957 and that at that time Judge Friedman had not been served with a subpoena to appear before the Additional Special Term or to produce any of the records in his possession. At his request I saw him in my chambers at the Appellate Division Courthouse in Brooklyn. He stated that he had heard rumors, which he believed to have emanated from the inquiry, that his personal conduct was under investigaton, which caused him considerable concern because he knew that it was the policy of our court that names of persons under investigation should not be disclosed. He also stated that he had been requested to appear and produce books and records at the Additional Special Term presided over by Judge Arkwright, that he had offered to make the books and records available for inspection at his chambers, but that the offer had been rejected.
>
> It was, he said, a matter of common knowledge at the courthouse whenever anyone of any prominence was called as a witness before the judicial inquiry, and that it would be a matter of considerable embarrassment to him if he should be required to appear before the inquiry, and produce his books and records in open court. He was willing, he said, to make the books and records available for inspection at his chambers, and believed that he should be spared, if

possible, the embarrassment of an appearance before the Additional Special Term. He inquired whether our court would take some action so as to provide that his books and records might be produced at some place other than at the Additional Special Term. I stated to him that I would submit his inquiry to the members of our court. I did so, a few days later, and it was decided that the court should not intervene, or instruct Judge Arkwright as to the manner in which he should proceed. I so informed Judge Friedman."

Dennis M. Hurley, counsel to the Judiciary Inquiry, conceded that the records were offered to him for inspection in appellant's chambers (R., Vol. III, 934a, 951a, 958a).

Jackson A. Dykman, former president of the New York State Bar Association (R., Vol. II, 622a), offered the use of his own nearby law office for the examination of the records, (R., Vol. II, 514a, 594a, 595a, 641a, 642a; Vol. IV, 1373a-1375a), an offer which Mr. Hurley recommended be accepted (R., Vol. III, 1189a, bottom of page), but which Justice George A. Arkwright, then in charge of the inquiry, rejected (R., Vol. II, 512a). There was some personal acrimony between appellant and Justice Arkwright (R., Vol. II, 532a, 533a, 787a), but the record does not show that this was the reason for the rejection of the offer or of the proceedings which followed.

Mr. Justice Edward G. Baker succeeded to the inquiry in place of Justice Arkwright. Justice Baker stated that if he had been presiding at the time, he would have accepted the offer (R., Vol. 11, 569a), and that immediately after his own appointment as Presiding Justice over the inquiry, appellant stated that his books and records were available for inspection (R., Vol. II, 569a).

As a matter of fact, Justice Baker changed the procedure with respect to examination of financial records sought by the inquiry, stating as follows (in a wholly un-

related case, see Exhibit 2, p. 2, attached to inside back cover, R., Vol. IV).

> "The Court: Perhaps I should say preliminarily that in other situations where attorneys have hesitated or refused to produce and leave with us the records subpoenaed we have gone along with the suggestion that those records be examined from day to day as long as may be necessary, in the offices of the attorneys under inquiry, and with any reasonable condition that might be imposed by those attorneys. For example, having some one of the office there while the records are examined, and we are perfectly willing, I think I should say for the record, in this instance, to do the same thing. If it is a question of surrendering and leaving the records you need not be concerned with it because we are perfectly willing to have our accountants or an attorney of the staff, or both, whoever it may be decided should look at them, go to your office or any other place which may be convenient, to examine those records, and we have no objection whatever to your having someone there during the course of the examination."

Existing case law did not require the surrender of books and records, even under subpoena, but merely their production for inspection. *Matter of Atlas Lathing* v. *Bennett*, 176 Misc. 959 (N. Y.); *Matter of Kelly*, 19 F. R. D. 269; *Matter of Bendix Aviation Corp.*, 58 F. Supp. 953; see also *Hagan*, "Impounding and the Subpoena Duces Tecum," 26 Brooklyn Law Review 199.

The only reason stated by the representatives of the Judicial Inquiry for refusing all offers of inspection and examination, unless the records were surrendered to them, was that it did not suit their convenience (R., Vol. II, 595a; Vol. III, 956a, 958a, 959a) even though the suggested places were either across the street or around the corner from the inquiry office (R., Vol. IV, 1265a).

Mr. Jackson A. Dykman and Mr. Theodore Kiendl, called into consultation when the offers for inspection were refused by the inquiry, advised appellant that his position, that examination of the records should take place without requiring that they be surrendered, was legally justified (R., Vol. II, 640a, 685a, 686a, 765a, 766a). Appellant was willing to have the financial records of himself and his brother examined, seeking only to avoid publicity and loss of complete control (R., Vol. II, 548a-551a, 672a-679a, 686a-689a). In any event, the financial records were later on inspected and examined for over a period of about a year and a half (R., Vol. IV, 1371a), under security arrangements made by Mr. Justice Baker (R., Vol. II, 556a, 780a, 781a).

It appears clearly from the record that appellant had good reason to take steps to protect his reputation against unjust attack. He was vilified through a great deal of newspaper publicity (R., Vol. II, 548a-551a, 679a, 680a, 686a-689a; Vol. IV, 1366a-1368a), which commenced on January 8, 1958 and continued unabated until May, 1962. Scurrilous references were made about him, including particularly offensive stories about ambulance chasing activities, even though not a single ambulance chasing charge was ever made against either him or his brother (R., Vol. IV, 1369a). Justice Baker, on one occasion, agreed that appellant "had every reason to complain" about the publicity "because it appeared that somebody in the inquiry evidently had violated a confidence, had spoken to reporters" (R., Vol. II, 548a).

Appellant was additionally embarrassed in his position on the bench through the issuance of subpoenas for his personal bank account (R., Vol. II, 702a, 770a; Vol. IV, 1281a); by being handed a letter from the Judicial Inquiry in his own courtroom and across the bench, with a loud public announcement as to whom it was from (R., Vol. II, 691a; Vol. IV, 1271a); by having an investigator from the

inquiry sitting in his courtroom for three days to observe appellant's actions on the bench (R., Vol. IV, 1285a); by subpoenaing the personal Clerk attached to his chambers and inquiring about appellant's conduct there (R., Vol. IV, 1285a); and by calling in lawyers who had appeared in a litigation before him to inquire about his conduct in the case (R., Vol. IV, 1285a).

Such an investigation went far beyond the authority given to the Judicial Inquiry. Appellant took the position that he was justified in seeking to protect himself against these invasions of his reputation, since judges, not being wholly free to protect themselves against unjust attack (Canon 1, Canons of Professional Ethics), must sometimes adopt indirect methods to avert unjust criticism and clamor (R., Vol. II, 763a).

Appellant's possession of the financial records of his brother and of his former partnership came about in the following way.

Appellant's brother was a practicing attorney in Kings County, New York State. Prior to his ascension to the Bench, appellant had been in partnership with that brother, practicing under the firm name of Friedman & Friedman (R., Vol. II, 649a, 650a). Upon his appointment to the Bench, procedures were instituted for the liquidation of the partnership. Because of the large volume of litigation pending at the time when the partnership terminated, the liquidation extended over a period of several years (R., 1247a, 1248a).

Because of appellant's continued responsibility to file income tax reports of the liquidating partnership, and to pay the tax due thereon (R., Vol. IV, 1361a), his prior accounting experience and his prior supervision of the firm's bookkeeping records (R., Vol. II, 652a-659a; Vol. IV, 1313a), appellant, with the consent of his brother, moved the firm records to Chambers when he ascended the Bench (R., Vol.

II, 659a). The firm accountant would call at appellant's chambers to record the necessary entries, and since the method of liquidation made it necessary that the liquidation set of books and the surviving partner's bookkeeping records be co-related to each other, the individual books of the remaining partner were also kept in appellant's chambers. Both sets of books were worked on together by the accountant (R., Vol. II, 694a, 738a; Vol. IV, 1309a-1312a).

In addition to the charges already referred to, appellant was tried on two *additional* charges not included in the statement of charges served upon him. These additional charges were (1) that appellant practiced law while serving as a Justice of the Court, in a matter known as *Shevak*, and (2) that he failed to declare properly and pay income taxes (minutes of Dec. 10, 1962, attached to R., Vol. I, pp. 6-14).

The Court on the Judiciary was unanimous in exonerating appellant on the income tax charge (see Appendix A, which makes no finding of guilt on this charge).

Respecting the so-called "practice of law" charge, this is the way counsel designated to conduct the inquiry described it (see minutes of Dec. 10, 1962, p. 14, attached to R., Vol. I):

> "On the Shevak matter—while it may well have been an act of friendship on the part of Judge Friedman, and certainly there's no evidence of any fee having been obtained for this act. Nevertheless it boils down to the practice of the law—because he called up the President of the American Fore about the matter, it was referred to an investigator of that company and then he proceeded to negotiate with the investigator to get the settlement price up to $3,000. And in addition he told the American Fore people that they weren't to pay any attention to the other lawyer who had originally been in the case and had filed the notice that such a claim would be

made. I think it's an incident which perhaps taken alone *would not be sufficient for removal*—but considered as against all the other charges, it's indicative of the character of the man and what he has done that warrants removal." (emphasis supplied)

The record shows that the Shevack matter involves a perfectly innocent incident shortly after appellant's ascension to the Bench when, out of purely humanitarian motives and without the slightest thought of personal gain, he responded to a call from a neighbor to help protect an infant's money from threatened misappropriation by a father who had abandoned the infant (R., Vol. IV, 1330a-1349a).

The constitutional provisions set forth in Appendices E and F both provide that action of the Court on the Judiciary shall extend to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit in the State of New York. The disqualification was obviously included in the instant provision to permit the court to bar the holding of a public position by one who was guilty of grave misconduct. No such disqualification is included in the instant order of removal (Appendix A). There was not even a claim that appellant was in any way corrupt, or that he misconducted himself in his function as a judge.

Court on the Judiciary as Investigator, Preferrer, Prosecutor, and Trier of the Charges

The subject sections of the New York State Constitution provide that a Justice of the Supreme Court may be removed "for cause" by a court on the judiciary; that such a court may be convened by the Chief Judge of the Court of Appeals upon his own motion, and shall be convened upon a written request by a Presiding Justice of the Appellate Division of the Supreme Court, amongst others; that the justice charged must be served with a statement of

the charges alleged for his removal; that the Chief Judge of the Court of Appeals shall act as presiding officer of the court; that after said court has convened and charges have been preferred, certain notices shall be given by the presiding officer to the Governor and the Legislature in order to give the Legislature a first opportunity to try the charges; and that the Court on the Judiciary shall have power to designate an attorney or attorneys to act as counsel to conduct the proceedings.

On July 2, 1962, the Presiding Justice of the Appellate Division, Second Department, requested the Chief Judge to convene a Court on the Judiciary "to consider matters involving the conduct of Mr. Justice Louis L. Friedman, a Justice of the Supreme Court, State of New York, Second Judicial District," arising "out of matters disclosed in a report of Mr. Justice Bernard S. Meyer, filed in this Court (the Appellate Division, Second Department) in a proceeding entitled 'In the Matter of M. Malcolm Friedman, an Attorney, Denis M. Hurley, Petitioner; M. Malcolm Friedman, Respondent'." (R., Vol. I, p. 1 of Clerk's Minutes attached to inside back cover.)

Pursuant to that request the Chief Judge sent out a call to convene the Court for August 15, 1962 (same reference). On that day the Court on the Judiciary "determined preliminarily that sufficient cause exists for the preferral of charges" (see same clerk's minutes, p. 3, last ¶ of Statement of Charges; as well as letter of Presiding Judge Desmond ¶(6) attached to the affidavit on the motion to vacate the removal order). A press release issued by said Court on the Judiciary stated that the Court had "determined preliminarily that sufficient facts were disclosed as to the conduct of Justice Friedman for the preferral of charges for removal from office" (see p. 1 of release attached to same affidavit on the motion to vacate the removal order). On the same day John R. Davison, Esq. and William R. Brennan, Esq. were designated by the

said Court to act as counsel to conduct the proceeding. The said counsel then submitted proposed charges to be made by them to the Court; the Court determined that the charges were in form fairly permitting an answer; directed them to be entered in the minutes; and further directed that counsel serve them upon appellant (R., same clerk's minutes, entries under date of Aug. 15, 1962). Counsel so designated by the Court are paid fees and expenses by order of the Presiding Judge of the Court, who fixes the amount thereof (Chapters 1 and 203, New York State Laws of 1963, Total Appropriation for Court on the Judiciary in Chapter 1, $26,000, and in Chapter 203, $16,000).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND IMPORTANT

I

The Court on the Judiciary acted as preferrer, prosecutor and trier of the charges, and thus violated due process under the doctrine of *In re Murchison*, 349 U. S. 133.

Appellant was elected for a term of office which normally would have expired on December 31, 1970. He had a constitutional right to that office and its emoluments, entitled to the protection of due process, *Torcaso* v. *Watkins*, 367 U. S. 488, 495, 496; *Slochower* v. *Board of Education*, 350 U. S. 551, 555-557; *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192. As a member of the pension system of both the City and State of New York, appellant has a property right therein because of contributions made by him into the State Pension Fund as a member of the Assembly, as a Senator and as a Justice of the Supreme Court during the past twenty-two years, and into the City Pension Fund during the past seven years (see Article V, Section 7 of the New York State Constitution).

Section 2 of the Judiciary Law of the State of New York makes "a court on the judiciary" a court of record (McKinney's Consolidated Laws of New York Annotated, Book 29). As such, it is invested with judicial functions. By exceeding such functions, the said court violated due process under the doctrine of *In re Murchison*, 349 U. S. 133. Here such functions were exceeded when the court determined preliminarily that the facts of the instant case constituted sufficient or probable cause for making the charges, and directed that counsel designated by the Court prefer and prosecute them. That is normally a prosecutorial or investigating body's function. It compares to a grand jury function in a criminal case.

Designated counsel were an integral part of the court. Designated and directed by the court to prefer and prosecute the charges, the amount of their compensation was fixed by the Presiding Judge (Chapters 1 and 203 of the Laws of New York, 1963; appropriations for Court on the Judiciary), and depended in the first instance, on the institution and pendency of the proceeding against appellant.

Pertinently, *In re Murchison*, 349 U. S. 133, 137, *supra*, contains the following:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

There can be no question but that under the subject provisions of the New York State Constitution, the Court on the Judiciary itself or by its designated counsel has the function both of investigation *and* trial (sub. (6)(c) of sec. 9a, and sub. f. of sec. 22). Both subject sections provide that the Court on the Judiciary has the power to make its own rules and regulations concerning the procedure to be adopted "for the investigation and trial" of a judicial officer.

The Queen v. *The London County Council* (*Ex parte Akkersdyk et al.*), 1 Q. B. 190 (1892), is another case in point. There four members of the Council had retained an attorney to appear in opposition to an application which was before that Council. Even though the four members present did not vote on the question, the Queens Bench Division held that the proceedings were not in accordance with law, that they violated due process, and that they were void. In setting aside the determination of the London County Council, the Court said (p. 195):

> "In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his license; to use the words of Cotton, L. J., in *Leeson* v. *General Council of Medical Education*, 'Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.' In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence. • • • Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a passage from the judgment of Cotton, L. J., in the case above named, in which he says: 'Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings

> forward the accusation or complaint on which the order is made'."

In a recent case, (June 1962) the Circuit Court of the District of Columbia considered the question of whether a proceeding before the Securities and Exchange Commission was tainted by reason of failure of due process, *Amos Treat & Co.* v. *S. E. C.*, 306 F. 2d 260. The opinion shows that one of the Commissioners who was sitting at the time of the hearing had been a member and Director of the Securities & Exchange Commission's Division of Corporation Finance, which had previously instituted an informal investigation involving a certain registration statement filed by petitioner. This Director was thereafter appointed as a member of the Commission itself and sat at the hearing.

When the hearing took place, the appellant, upon learning of the identity of the Commissioner and of the fact that he had been the Director of the Division which had instituted the investigation, and that he was also a member of the quorum of the Commission which had promulgated the ruling sought to be enforced, moved that the hearing be annulled. The Commissioner thereupon disqualified himself from further participation, and did not vote on the decision.

The Circuit Court, explicitly on due process grounds, annulled the determination made by the Commission. Citing *In re Murchison*, 349 U. S. 133, *supra*, and *Berkshire Employees Assn.* v. *National Labor Relations Board*, 121 F. 2d 235, the Circuit Court said (p. 266):

> "We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weight its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency."

Having participated in the original inquiry as to whether charges should be made, and the preliminary determination to do so, the Court on the Judiciary was disqualified from thereafter proceeding to hold a hearing. *People* v. *Haas*, 105 App. Div. 119, 122-123, states:

> "• • • No effort of the will can shut out memory; there is no art of forgetting • • •."

In *Reger* v. *Mulrooney*, 241 App. Div. 38 (N. Y.), a determination of the Police Commissioner removing policemen from their office was annulled because the deputy police commissioner who heard the testimony and made the findings of fact was disqualified from hearing the matter, and yet proceeded to do so. The Court held that in passing upon the charges made against the police officers, "the commissioner exercised all the functions of a judicial officer." Having "thus acted in a judicial capacity," he was required to do so only by means of due process.

A question of due process was considered in the matter of *In Schlesinger Appeal*, 404 Pa. 584 (1961) (Supreme Court of Pennsylvania). In overruling for failure of due process, a determination which disbarred an attorney, the Court held (pp. 597-598):

> "The functions of prosecutor, judge and jury were combined in one body, namely, the Committee on Offenses, which lodged and prosecuted and, through its Subcommittee of three of its own members, adjudicated the charge of unprofessional conduct whereon the Court of Common Pleas, without any hearing of witnesses, ultimately entered the order disbarring the appellant. The full Committee on Offenses consisted of fifteen members of the Bar of Allegheny County, jointly appointed by the President Judge of the Court of Common Pleas of the County and the President of the Allegheny County Bar Association. This Commitee, acting on its own initiative, lodged with Schlesinger the complaint charging him with 'professional misconduct.' The

Committee appointed counsel to prosecute, on its behalf, the charges before its Subcommittee, to which the Committee referred the complaint for hearing, report and recommendation thereon. The appellant challenged for cause each of the members of the Committee on the ground, inter alia, that 'Each said member individually and jointly with all other members of the Committee is a complaining party herein and is attempting to sit in judgment upon his own cause.' The challenge was rejected. The Committee, as prosecutor, called and examined its witnesses against the appellant and vigorously conducted an adversary proceeding against him before its own Subcommittee which, as judge, presided over the hearings, passed upon the credibility of the witnesses, determined the inferences to be drawn from their testimony, and deduced therefrom the facts which it found. The Committee also passed upon and approved the *quantum* of compensation to be paid its witnesses."

After quoting from *In re Murchison*, 349 U. S. 133, *supra*, the Court continued:

"Here, a member of the bar, charged with unprofessional conduct by a bar Committee on Offenses, was prosecuted on the Committee's complaint before a Subcommittee, composed of three members of the Committee, sitting as the trial tribunal. In such a procedure, so contrary to traditional American juridical concepts, unfairness was, ipso facto, inherent; it was fraught with the possibility of temptation to each member of the trial tribunal to favor, consciously or unconsciously, the prosecuting body which appointed him and of which he was a member. The record as a whole contains a reasonable basis for doubt as to whether impartiality on the part of the members of the tribunal was completely absent and suggests an unsympathetic predisposition toward the appellant. Moreover, a predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely, 'a possible temptation to the aver-

> age man as a judge * * * not to hold the balance nice, clear and true' is sufficient. Such 'a possible temptation' was implicit in the proceeding before the prosecutor's own Subcommittee which resulted in appellant's disbarment."

The opinion of the Supreme Court of Pennsylvania cites other authorities where similar failures of due process had occurred by reason of the fact that the functions of prosecutor and judge had been lodged in the same body, and where the Court had annulled determinations made under such circumstances.

In *Matter of Richardson* v. *Scudder*, 247 N. Y. 401, Judge Cardozo described the procedure which had been followed there by a Supreme Court Justice appointed by the Governor to conduct an investigation, and concluded that since "a preliminary investigation * * * was 'a search by an inquisitor'," the justice who supervised such an investigation should not also sit as a justice upon the main question involved. There, too, as in the present proceeding, the Court had appointed counsel to conduct an investigation.

In England many years ago, (1908), Lord Russell said, "That it is possible very effectively to poison the fountain of justice before it begins to flow." *In re Parke*, 2 K. B. 432.

Quoting again from *In re Murchison*, 349 U. S. 133, 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

Both the substance and the spirit of due process as prescribed by the doctrine of *Murchison* are violated by the instant provisions of the New York State Constitution as applied herein, which explicitly lodge the functions of

"investigation and trial" in the Court on the Judiciary, and the function of prosecution as well by the power to designate and pay for counsel to prosecute the proceeding.

II

The instant sections of the New York State Constitution violate Fourteenth Amendment due process for vagueness, in that they purport to authorize removal for "cause" without providing any standards to define the meaning of that term.

Since there are no standards provided (cf. *Matter of Droege,* 197 N. Y. 44, 51), the "cause" for removal is left entirely to the judgment, whim or even caprice of the judges, who at any given time make up a Court on the Judiciary. As was written in *Droege* (pp. 51-52):

> "• • • Neither the constitution nor the statutes have attempted to define what that 'cause' shall be.",

by reason of which, it is left entirely and exclusively to the "discretion" of the removal tribunal. Thus one bench, with no standards to guide them, may determine that removal should be accomplished for conduct which other judges, sitting on another occasion, or even in the same proceeding, may consider perfectly proper. [Cf., the proceedings in the instant case where four judges held appellant's conduct sufficient "cause" for removal, while two others voted to dismiss the charges; and where the majority held the Shevack incident sufficient "cause" for removal, even though their own designated counsel agreed that it was not. (See *infra,* p. 12 this statement, bottom of page.)]

With no guideposts to show the way or compass by which to steer, the independence of the judiciary hangs in

the balance. No judge can ever be sure that actions which he considers perfectly proper, may not some day be construed by some court on the judiciary to be "cause" for his removal.

The danger of such a situation is particularly magnified since the removal section (9a, now 22 of Article VI), makes no provisions for appeal or other review of what constitutes "Cause." (See opinion of Appellate Division, Third Department, Appendix D, hereto, p. 38, in the instant case, holding that there is no right or method of direct review even on jurisdictional grounds, because of the hierarchical scheme of courts in New York State.)

The vagueness of the instant provisions violates federal due process (*Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278, and the cases therein cited). In *Cramp*, the facts were that a Florida statute required every employee of the state to execute an affidavit in writing that he had never lent his "aid, support, advice, counsel or influence to the Communist Party." The law directed immediate discharge of any employee who failed to file such an oath. Appellant was a teacher in one of the public schools of the state and refused to file the required oath. Alleging that he had done none of the things mentioned in the statute, and that its meaning was so vague as to deprive him of liberty or property without due process of law, he brought an action in the state court for a judgment declaring the statute unconstitutional and enjoining its enforcement. The highest state court denied him relief. The United States Supreme Court reversed, and granted him judgment, stating the applicable principles as follows (287):

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,

violates the first essential of due process of law.' Connally v. General Construction Co., 269 U. S. 385, 391. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U. S. 451, 453. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U. S. 174, 176. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' (Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210, 243.''

The same principles condemn the instant removal provisions as unconstitutional for vagueness.

III

Appellant was denied due process in that he was tried and removed from office by a body which was not a duly composed and constituted court under the mandate of the constitutional provision which authorized its creation.

Both section 9-a and the superseding section 22 provide that a Court on the Judiciary shall be composed of the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, and one Justice from each of the four Appellate Divisions of the State, designated by concurrence of the majority of the Justices of each such Appellate Division. The section further provides that in the *absence*, inability or disqualification of the Chief

Judge of the Court of Appeals, or of the Senior Associate Judge of that Court, the Court of Appeals shall designate a judge or judges from the Court of Appeals to act in his or their stead. Thus, the Court on the Judiciary is required to be composed of six judges, two of whom must be from the Court of Appeals.

The Court on the Judiciary here violated the law of its existence in both respects. It was not composed of six judges, nor were there two judges from the Court of Appeals. On August 15, 1962 when the court was first composed, and when it proceeded with respect to the various matters hereinabove discussed, there were present only four Judges in all, and only one of them was from the Court of Appeals. The Clerk's minutes of its meeting of August 15, 1962 show as follows (see p. 12, Clerk's minutes, attached to back cover of R., Vol. I):

> "Aug. 15. Court convened pursuant to notice from Presiding Judge Charles S. Desmond.
>
> Present:
> Hon. Charles S. Desmond
> Hon. Arthur D. Brennan
> Hon. William H. Coon
> Hon. Earle C. Bastow
>
> Absent:
> Hon. Marvin R. Dye
> Hon. Benjamin J. Rabin"

Judge Dye, who was absent, is a judge of the Court of Appeals. No other judge from that court was designated in his stead as required by the Constitution.

In this very matter, the opinion of the Appellate Division, Third Department (Appendix D, pp. 38, 41) states:

> "Moreover, due process of law requires that the court or other tribunal is competent and duly constituted."

Appellant's failure to object to the composition of the Court on the Judiciary was due to the circumstance that

he first became aware of the fact that the two judges had been absent on August 15, 1962, when *after* February 22, 1963, the clerk furnished appellant with a copy of the clerk's minutes, the only place where that fact is recorded. He then ascertained that one of those judges (Judge Dye) was in California, and the other (Justice Rabin) was in Europe. (See affidavit of appellant in support of motion to vacate, p. 7.) In addition, he was misled (albeit unintentionally), by three orders made by the Court on the Judiciary on that day, August 15, 1962, in which it is recited that all six judges were present, (see 3 orders dated August 15, 1962, attached to R., Vol. I, back cover), and by the Court's own press release already referred to (see undated release of Court on the Judiciary, attached to affidavit of appellant in support of motion to vacate), in which it is stated that "the *six judge body*" made the preliminary determinations (emphasis supplied).

IV

Appellant was denied due process in that he was tried on two charges not contained in the statement of charges served upon him; and the Court on the Judiciary proceeded to trial without giving notice to the Governor and Legislature as mandated by the New York State Constitution.

As already appears, the original statement of charges served upon appellant contained two specifications, followed by a broadside charge (Specification 3) that appellant violated unspecified Canons of Judicial Ethics, and caused his brother to violate the Canons of Professional Ethics (see Appendix G hereto). He was tried on two additional specific charges which were never served upon him, namely, the income tax matter and the Shevack claim (see typewritten minutes of proceedings before Court on the Judiciary under date Dec. 10, 1962, attached to R., Vol. 1, inside front cover).

Both section 9a and the superseding section 22 (Appendices E and F) required that the presiding officer of the Court on the Judiciary shall, at least 60 days before a hearing commences, give notice to the Governor, the President of the Senate (the President Pro Tem of the Senate under sec. 22), and to the Speaker of the Assembly "of the nature of the charges" and the date set for the trial thereof, which shall be at least sixty days thereafter. The sections further provide that in the event that any member of the Legislature shall prefer "the same charges" and such charges are entertained by a majority vote of the Assembly, the Court on the Judiciary shall be stayed pending the determination of the Legislature, which shall be exclusive and final. Here, the presiding officer of the Court on the Judiciary gave notice of two of the charges, and the alleged violation of the Canons of Ethics arising therefrom (Appendix G), but failed to give notice of the two additional charges which were added and allowed by the Court over objection on December 10, 1962, and upon which appellant was tried.

There was thus a violation of the fundamental requirement of notice and procedural due process.

V

Appellant will still be amenable to answer under the traditional procedures of address or trial before the Court for the Trial of Impeachments of New York State, though the instant provisions be declared unconstitutional.

Though appellant denies that he has done anything warranting removal, yet it must be pointed out, as will presently more fully appear, that there are other methods under the New York State Constitution by which he can be called to account. These other methods are the traditional ones and were exclusive until 1947, when the instant provision was first added.

In New York State, Article VI, sections 9 and 10 of the Constitution (in effect prior to September 1, 1962), provided two other methods of removal. Both of these sections were continued, with slight language changes, when the new Judiciary Article went into effect on September 1, 1962. Both of the new sections are still in effect (Art. VI, secs. 23 and 24).

While section 23 (former sec. 9) applies only to Judicial officers, and authorizes removal by legislative address (in some cases, by the Senate alone upon recommendation of the Governor), section 24 (former sec. 10) provides for removal of all State officers, including judges, only through impeachment by the Assembly followed by trial before a court for the trial of impeachments. The provisions creating that Court for the Trial of Impeachments were placed into the Judiciary Article of the Constitution in recognition of the fact that said Court is indeed a judicial tribunal, even though composed of the members of the State Senate and the Judges of the Court of Appeals. It is defined as a court of record (sec. 2, sub. 1, Judiciary Law, New York State, McKinney's Consolidated Laws, Book 29), and a court having original *criminal* jurisdiction (sec. 11, New York State Code of Criminal Procedure). The procedure of the Court, in addition to the provisions set out in Article VI, section 24 of the Constitution, is governed by sections 12-20 incl. and sections 118-131 incl. of the Code of Criminal Procedure. Recognizing the severity of the judgments of a court of impeachment, the legislature permits removal by that Court only "for wilful and corrupt misconduct in office" (sec. 12, Code of Criminal Procedure).

Thus, it is apparent that New York State has always recognized that a court proceeding for the removal of a State officer (including one holding high judicial office), as distinguished from removal by legislative address, is a criminal proceeding, in which an accused is entitled to be surrounded with all of the constitutional safeguards af-

forded a defendant in a criminal trial. Like in many other criminal actions where the penalty imposed does not include imprisonment, the punishment here meted out is loss of position and property. A finding of guilt imposes a forfeiture of office and the emoluments thereof, in addition to the loss of a good reputation, generally built up over many years.

In 1947, the third method for the impeachment and trial of high judicial officers was made part of the New York State Constitution (the instant section, Art. VI, sec. 9-a Appendix E hereto). Built upon a desire for expediency in the disposition of such a proceeding, it was labeled a "Removal" instead of "Impeachment" proceeding. No implementing legislation or statutory procedural controls, such as govern proceedings before the Court for the Trial of Impeachments, were ever enacted by the Legislature. The result was the creation of a judicial tribunal having the function of both impeachment and trial, devoid of federal due process protective provisions for those it impeached or accused, and authorized to remove for a "cause" which may be only the whim or caprice of those judges who happened to be members of the court at any given time.

VI

The highest New York State court has not yet passed upon the first impression question as to whether there is any form of state court review of a removal made by the Court on the Judiciary.

Appellant has other proceedings pending. Finding himself on the horns of a dilemma because the procedure is new, and faced with the various limitations of time prescribed by statutes and the rules of the respective courts, this appeal has been taken to this court at this time as a protective measure to insure that the time allowed for

appeal will not expire before the highest court of New York State determines whether there is or is not a right of review. If it should be ultimately determined, as has been urged by counsel designated by the Court on the Judiciary, that there is no right of review through State court procedure, then appellant would be barred from any method of relief, if this appeal had not been taken. As of the present writing, review has been attempted in the Appellate Division, Third Department, by way of both appeal and Article 78 Proceeding (New York Civil Practice Act) and that court has held that it does not have the power to review orders of the Court on the Judiciary (Appendix D hereto).

An application will shortly be made to the Appellate Division, and if denied, to the Court of Appeals, for leave to appeal to the Court of Appeals from the determination that review is not possible by reason of lack of power. Only when the Court of Appeals finally determines this question of power to review, can appellant definitely certify to this Court that the determination by the Court on the Judiciary is, or is not, that of the highest New York State court in the instant proceeding.

In addition, and in compliance with the opinion of the Appellate Division, Third Department, that collateral attack is possible, appellant, on the last day permitted by law to do so, has instituted a proceeding in the Supreme Court, New York County, for the payment of salary due him, on the theory that the order of the Court on the Judiciary is void by reason of lack of jurisdiction (*supra*). That proceeding, too, is being attacked by the same designated counsel, who have moved to intervene and dismiss the said proceeding on the same ground that no state court has jurisdiction to review. In his affidavit in support of that motion to dismiss, Mr. Davison, one of the designated counsel has stated:

> "• • • *deponent and Mr. Brennan were the parties designated by the court on the Judiciary to prefer*

> *the charges* which resulted in the determination of that court, which is here sought to be collaterally attacked." (Affidavit of John R. Davison, sworn to July 11, 1963, not part of this record, emphasis supplied.)

As of the time of this submission, the proceeding remains undetermined.

Appellant respectfully suggests that because of the unusual circumstances here present, determination by this Court of the question of jurisdiction, might be withheld until appellant has had the opportunity to file a supplemental statement (with this Court's permission) as to the ultimate determination made of the question of state court power to review.

VII

The questions presented are not only substantial but also important.

The questions presented are important because of the non-legislative removal procedures in so many states in the Union. They are important because the instant removal procedure of New York State stands alone in providing for the fusion of the preferral, prosecution, trial and ultimate disposition before the same body. They are important to the independence of the members of the judiciary all over the nation, for whose possible removal from office all impeachment procedures have been devised. They are important to the millions of voters who select the judges of New York State for a specified term, and whose constitutional prerogatives to do so should not be thwarted through unconstitutional methods. They are important to the more than a million voters who selected appellant for a term of office which would have normally expired in 1970. They are, of course, important to appellant, who now, after almost a quarter of a century of

devoted public service, finds the means of livelihood of himself and his family taken away through unconstitutional procedures, and by a majority of but one vote.

CONCLUSION

This appeal should be heard and decided on the merits.

Respectfully submitted,

THEODORE KIENDL,
Attorney and Counsel for Appellant,
Office & P. O. Address,
One Chase Manhattan Plaza,
New York, New York 1005.

RAPHAEL H. WEISSMAN,
of Counsel.

Appendix "A"

Order of Removal

STATE OF NEW YORK

COURT ON THE JUDICIARY

At a Court on the Judiciary for the State of New York held at on the twenty-second day of February A. D. 1963.

Present,

HON. CHARLES S. DESMOND, *Presiding.*

" MARVIN R. DYE,
" BENJAMIN J. RABIN,
" ARTHUR D. BRENNAN,
" WILLIAM H. COON,
" EARLE C. BASTOW.

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District.

The Court on the Judiciary, having heard the proofs of the parties as stipulated and offered and the oral arguments of counsel and having examined the briefs of counsel, finds and decides as follows:

(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January 1957 by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department;

(2) That said Louis L. Friedman engaged in unethical and improper conduct in that, while a Justice

of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

(3) That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

(4) That by the acts and omissions described in Findings Nos. 1, 2 and 3 hereinabove, said Louis L. Friedman abused his public office as a Justice of the Supreme Court of the State of New York;

(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said Louis L. Friedman;

Now therefore it is ORDERED and ADJUDGED that said Louis L. Friedman be and he hereby is removed from his office as Justice of the Supreme Court of the State of New York.

All concur except Rabin and Brennan, JJ., who dissent and vote to dismiss the charges.

A copy

RAYMOND J. CANNON,
Clerk.

Appendix "B"

Order Denying Motion to Vacate

STATE OF NEW YORK

COURT ON THE JUDICIARY

At a Court on the Judiciary for the State of New York held at Albany on the third day of April A. D. 1963.

Present,

HON. CHARLES S. DESMOND,

Presiding.

" MARVIN R. DYE,
" BENJAMIN J. RABIN,
" ARTHUR D. BRENNAN,
" WILLIAM H. COON,
" EARLE C. BASTOW.

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District.

An application having heretofore been made herein upon the petition of Louis L. Friedman sworn to on March 18, 1963 for an order requiring Counsel Designated to Conduct the Proceedings, to show cause why the order of removal entered herein on February 22, 1963 should not be vacated and why, in the meantime, and also pending final disposition of all proceedings that shall be taken herein the said order of removal should not be stayed and the Court having treated the proposed order to show cause as a notice of

motion and having duly considered all matters alleged in said petition, and the court having determined that the Court on the Judiciary had been duly convened pursuant to the Constitution and that at all of its sessions there were present members sufficient to constitute a quorum under the Court's rules adopted pursuant to the provisions of the Constitution, it is therefore

ORDERED that the motion be and the same hereby is denied.

CHARLES S. DESMOND,
Presiding Judge.

A Copy

RAYMOND J. CANNON,
Clerk.

Appendix "C"

Decision on Motion to Vacate

STATE OF NEW YORK

COURT ON THE JUDICIARY

DECISION

April 3, 1963

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District.

The court having treated the proposed order to show cause as a notice of motion to vacate the court's determination and having duly considered the matter, denies said motion.

The Court on the Judiciary was duly convened pursuant to the Constitution and at all its sessions there were present members sufficient to constitute a quorum under the court's rules adopted pursuant to the provisions of the Constitution.

No opinion. All concur.

Appendix "D"

Opinion of Appellate Division—Third Department

REYNOLDS, *J.*:

Respondent moves to dismiss an appeal from, and an Article 78 proceeding to review, a determination of the Court on the Judiciary dated February 22, 1963, removing Justice Louis L. Friedman from his office as Justice of the Supreme Court. Respondent also moves to dismiss an appeal taken from the order dated April 3, 1963 by the Court on the Judiciary denying appellant's motion to vacate its order of February 22, 1963 removing appellant from his office. The appeal, petition and cross-motion of appellant also ask for a stay of the determination of the Court on the Judiciary until the issues in the appeal and/or Article 78 proceeding are decided by this court. The issues to be determined are: (1) Whether a judge removed from office by the Court on the Judiciary may review that determination by an appeal to this court. (2) Whether a removed judge may review his removal by an Article 78 proceeding in this court.

The Court on the Judiciary was established by Article VI, § 22 of the New York State Constitution and no right to appeal is provided for therein. Appellant contends that the instant determination is appealable for two reasons, First: That it is appealable as an order in a special proceeding under Civil Practice Act, § 631. Second: That this appeal must lie, despite the absence of statutory authority because appellant is attacking the jurisdiction of the Court on the Judiciary and the manner in which it conducted the proceedings leading to his removal. As to the first contention, Civil Practice Act, § 631(2) provides:

> "An appeal may be taken to the appellate division of the supreme court,
>
> " * * *
>
> "From an order, affecting a substantial right, made by a court of record possessing original juris-

diction, * * * in a special proceeding instituted in that court, * * * pursuant to a special statutory provision. * * *."

We agree that the determination affects a substantial right, that the Court on the Judiciary is a court of record possessing original jurisdiction, but *Matter of Droege* (197 N. Y. 44) precludes any review under this section by holding that a proceeding to remove a judge is not a "special proceeding." In *Droege*, which involved the removal of a New York City Magistrate the court indicated that because the Constitution merely provided that inferior court judges could be removed for cause and granted no power to any particular body to conduct removal proceedings the legislature could as well have granted that power to the governor or any state officer rather than to the Appellate Division, as it did. This being so the court decided that the proceeding should not be termed a "special proceeding," for it certainly would not have been if the legislature had granted removal powers to any officer or body other than a court. The situation in the instant case is strikingly similar for, although the Constitution empowers the Court on the Judiciary to remove judges, it also grants power to the legislature to stay those proceedings and deal with the matter of removal itself (Article VI, § 22[e]). If the legislature had done that in this case we could not call this a "special proceeding" and under the authority of *Droege* we may not do so on the facts herein.

Although *Droege* precludes any review here of the merits of the case it points up the distinction between such a review and the judicial power to determine whether the power of the Court on the Judiciary was properly exercised in the form required by the Constitution. In fact, *Droege* indicates that the latter type of review may be available under certain conditions which leads us to appellant's second

contention. Despite the fact that there may be no right to consider the merits under § 631(2) appellant claims that there is a limited right to appeal to consider whether the Court on the Judiciary had authority to render the order herein and whether the court pursued the procedure prescribed in the Constitution, and legally proceeded according to its own established rules. He further contends, that such a right of appeal exists independent of statute and even if the statute proscribes such an appeal. It will be seen that the answer to the problem is whether this court can handle the jurisdictional issues either by appeal or by an Article 78 proceeding depends on whether the Court on the Judiciary is an inferior tribunal or a court of coordinate or superior jurisdiction. As we have pointed out, *Droege* which precludes an appeal under § 631(2), is authority, under certain circumstances, for the limited right of appeal requested by appellant in the case at bar. He can reasonably argue that *Droege* establishes that he has a right to have the question of jurisdiction decided by some court, and the remaining question is whether it could be handled by this court. The pertinent language in *Droege* is found at pages 52 and 53 where the court, quoting from an earlier decision, notes that when the Constitution (or a statute) vests a discretionary or judicial power in any *inferior tribunal or officer*, a higher court has no further control over the exercise of such power "than to see that such inferior tribunal or officer, on the occasion of its exercise, had jurisdiction over the subject-matter of its exercise—that is, that the occasion or circumstances, contemplated by the Constitution or the act, for exercise had occurred—and that the power has been exercised in the form prescribed by the Constitution or the Act." vesting such power. This reasoning has been applied in many cases, always in the situation, however, where a "higher" court is examining a decision of an "inferior" court or officer, and especially where a statute has pre-

cluded judicial review of the decision of the court or official in question or is to the effect that the decision of the inferior tribunal shall be "final and conclusive." Thus in *Matter of Guardian Life Ins. Co.* v. *Bohlinger* (308 N. Y. 174), where the court was reviewing a determination of the Superintendent of Insurance, Judge Fuld opined at page 183:

> "Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature."

(See also, *Matter of Merendino* v. *Graves*, 256 App. Div. 50; *Matter of Birmingham* v. *Graves*, 227 App. Div. 262, app. dmsd. 255 N. Y. 623, cert. den. 287 U. S. 669; *Matter of Skinkle*, 221 App. Div. 682.) The theory involved is that a court (or administrative officer or body) must have jurisdiction in order to render a valid judgment or determination of any kind binding upon the parties concerned. A judgment or determination granted without jurisdiction (meaning authority to render a judgment or determination which the court or officer assumes to do) is not entitled to full faith and credit in another state and may be attacked either directly or collaterally (7 Carmody-Wait, 204). An appeal, of course, attacks such a judgment directly. Moreover, due process of law requires that the court or other tribunal is competent and duly constituted. Unless jurisdiction exists, the judgment rendered is not by due process of law (9 N. Y. Jurisprudence, Constitutional Law, § 350). But whether a court had jurisdiction in a certain case can only be determined by that court itself in the first instance and then in the final instance by a court of higher or superior jurisdiction to it (21 C. J. S. Courts, § 501). An appeal or other review on jurisdictional

grounds must comply with the hierarchical scheme of courts in the particular state involved. Thus the Appellate Division could not presume to answer whether the Court of Appeals had jurisdiction to render a judgment, while it would be the tribunal to answer jurisdictional questions addressed to the Supreme Court, Court of Claims, etc. The appellate jurisdiction of this court is a creature of statute. No appeal lies to the Appellate Division except by statutory authority, the absence of which precludes a right of appeal. (*Matter of Fischer* v. *Briante*, 6 A. D. 2d 814; *Matter of Anonymous* [*Hurley*], 6 A. D. 2d 1045; and see *Matter of Ryan* [*Hogan*], 306 N. Y. 11.) As stated by Judge Froessel, in the last cited case at 306 N. Y. 16; "It is well settled that appeal is not a matter of constitutional right, * * * such jurisdiction can never be assumed, unless a statute expressly authorizes its exercise * * *." It is our conclusion that the Court on the Judiciary is at least a court of co-ordinate jurisdiction (and probably superior jurisdiction) which precludes any relief at the level of the Appellate Division. In our view we cannot consider a review by way of an Article 78 proceeding, either in the nature of prohibition or certiorari because the Court on the Judiciary is at least a court of co-ordinate jurisdiction. In *Matter of Colin* v. *Appellate Division, First Department* (3 A. D. 2d 682, l. t. a. den. 2 N. Y. 2d 710), petitioner sought a restraining order in the Second Department to be issued against the First Department. The court in a unanimous memorandum decision denied relief.

> "At common law a writ of prohibition could issue only from a superior to an inferior court. (Chase's Blackstone's Comm. [3d ed.], p. 671). In this State it has always been recognized that such a writ could not issue to a branch of the same court or to a judicial officer of equal rank and powers

as the one granting the writ (*Matter of Attorney-General*, 32 Misc. 1), but only to subordinate courts and inferior judicial tribunals. (*Appo* v. *People*, 20 N. Y. 531, 540; *Matter of Hogan* v. *Court of Gen. Sessions*, 296 N. Y. 1, 8; *People ex rel. Jimeson* v. *Shongo*, 83 Misc. 325, affd. 164 App. Div. 908; see, also, *Smith* v. *Whitney*, 116 U. S. 167, 176.) That is the basic theory underlying the provisions of article 78 of the Civil Practice Act, insofar as they apply to proceedings to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess of jurisdiction. Essentially, the subject matter of this proceeding is an application to this court to restrain a court of equal rank and power from enforcing a rule promulgated by the latter. We are, in effect, being asked to enjoin the possible or anticipated future action of such a court. The relief is not sought against the individual Justices in their personal capacities but, rather, against them as a court, regardless of the identity of its present or future members. Similarly, any restraining order, if issued, would necessarily have to be directed against them in their collective capacity as a court. Since we are without power to direct or control the action of a branch of the court which has co-ordinate jurisdiction, it follows that we are without jurisdiction to grant the relief requested."

The Court on the Judiciary is composed of the Chief Judge and Senior Associate Judge of the Court of Appeals and four Appellate Division Judges (Article VI, § 22[b]). As the entire makeup of the court consists of Judges of a higher court and equal courts it must be assumed that it is not an inferior tribunal. It has the power to remove Judges and Justices of the Court of Appeals, Supreme

Appendix "D"

Court, Court of Claims, County Court, Surrogate's Court and Family Court (Article VI, § 22[a]) while the Appellate Divisions have removal powers only over Judges of inferior courts, i.e., courts of the City of New York, district courts, town, village and city courts (Article VI, § 22 [i]).

Therefore, the appeals and the Article 78 proceeding should be dismissed because of lack of jurisdiction and the application for a stay denied.

Appendix "E"

State of New York, Constitution, Art. VI, § 9-a

[Removal or retirement of judges and justices by court on the judiciary.] § 9-a. (1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a surrogate, a special surrogate, a judge of the court of general sessions of the county of New York, a county judge, a special county judge or a justice of a city court of record, may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of that court, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead.

(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard.

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer. The court in its discretion may suspend a judicial officer from the exercise of his office pending the determination

of the proceedings before the court. The action of the court shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit under this state, or to retirement for disability; but any judicial officer whose removal is sought shall be liable to indictment and punishment according to law. A judicial officer retired for disability in accordance with this section shall thereafter receive such compensation as the legislature may provide.

(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar association thereunto duly authorized. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer. After the court on the judiciary has been convened and charges of removal have been preferred against a judicial officer, the presiding officer of the court shall give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charges and the date set for the trial thereof, which date shall be not less than sixty days after the giving of such notice. Immediately upon receipt of such notice the legislature shall be deemed to be in session for the purpose of this proceeding.

(5) In the event that any member of the legislature shall, within thirty days after receipt of said notice, prefer the same charges against the judicial officer and such charges are entertained by a majority vote of the assembly

the court on the judiciary shall be stayed pending the determination of the legislature, which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judicial officer for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

(6) The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer; (d) to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and (e) shall have such further powers as the legislature may from time to time confer upon it.

(7) The judges and justices while exercising the powers of a court on the judiciary shall serve without additional compensation, but the legislature shall provide moneys by appropriation to meet the expenses of the court. (Added by vote of the people November 4, 1947.)

Appendix "F"

State of New York, Constitution, Art. VI, § 22

[Court on the judiciary; removal or retirement of certain judges by appellate division.] § 22. a. Any judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court or judge of the family court may be removed for cause or retired for mental or physical disability preventing the proper performance of his judicial duties after due notice and hearing by a court on the judiciary.

b. The court on the judiciary shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division of the supreme court in each judicial department designated by concurrence of a majority of the justices of each such appellate division of the supreme court. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of the court of appeals, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer.

c. The affirmative concurrence of not less than four members of the court shall be necessary for removal or retirement and the court may disqualify a judge or justice removed from office from again holding any public office of this state. Proceedings to remove or the removal of a judge or justice from office shall not prevent his indictment and punishment according to law. A judge or justice retired for disability in accordance with this section shall

thereafter receive such compensation as may be provided by law.

d. The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by a presiding justice of the appellate division of the supreme court or by a majority of the executive committee of the New York State Bar Association thereunto duly authorized. The court in its discretion may suspend the judge or justice from the exercise of his office pending the determination of the removal or retirement proceedings before the court.

e. After the court on the judiciary has been convened and charges of removal or retirement have been preferred against a judge or justice, the presiding officer of the court on the judiciary shall, before a hearing on charges of removal for cause commences, give written notice to the governor, the temporary president of the senate and the speaker of the assembly of the name of the judge or justice against whom charges have been preferred, the nature of the charges and the date set for hearing these charges, which shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice, the legislature shall be deemed to be in session for the purpose of this proceeding. If any member of the legislature prefers the same charges against the judge or justice concerned within thirty days after receipt of such notice and if such charges are entertained by a majority vote of the assembly, proceedings before the court on the judiciary shall be stayed pending the determination of the legislature which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judge or justice for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

f. The court on the judiciary shall have power to designate an attorney or attorneys at law to act as counsel to conduct the proceeding, to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial, to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and to make its own rules and procedures for the investigation and trial.

g. The court on the judiciary shall have such further powers and duties as may be provided by law.

h. The judges or justices while exercising the powers of a court on the judiciary shall serve without additional compensation but the legislature shall provide moneys by appropriation to meet the expenses of the court.

i. A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence.

Appendix "G"

The Charges

STATE OF NEW YORK
COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to Louis L. Friedman, Justice of the Supreme Court, Second Judicial District.

NOTICE

To:

Louis L. Friedman, Justice of the Supreme Court, Second Judicial District:

Please take notice that pursuant to Rule VI(a) of the Rules of the Court on the Judiciary you are required to serve upon the undersigned, counsel designated to conduct the proceedings, and to file with Raymond J. Cannon, Clerk of the Court on the Judiciary, whose address is Court of Appeals Hall, Albany, New York, an answer to the attached statement within 20 days after the service upon you of this notice and the attached statement, exclusive of the day of service.

Dated: August 15, 1962.

John R. Davison,
Counsel Designated to Conduct the Proceedings,
90 State Street,
Albany 7, New York,
and
William R. Brennan,
Counsel Designated to Conduct the Proceedings,
806-808 Morgan Building,
Pearl & Niagara Streets,
Buffalo, New York.

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Appendix "G"

STATE OF NEW YORK
COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to Louis L. Friedman, Justice of the Supreme Court, Second Judicial District.

STATEMENT OF THE CHARGES ALLEGED

That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District (1) by interfering with and obstructing a Judicial Inquiry and Investigation ordered by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on the 21st day of January 1957; (2) by engaging in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics.

The Court on the Judiciary has pursuant to Rule V of its Rules determined preliminarily that sufficient cause exists

for the preferral of charges against Louis L. Friedman, Justice of the Supreme Court, Second Judicial District and that the foregoing "Statement of Charges Alleged" contains allegations of fact in a form fairly permitting an answer by him and has directed that a copy thereof be served on him with opportunity to answer within 20 days after such service upon him, exclusive of the day of service. Trial shall be held at the Court of Appeals Hall in the City of Albany on October 19, 1962 or as soon thereafter as the proceedings may be heard.

JOHN R. DAVISON,
Counsel Designated to Conduct
the Proceedings,
90 State Street,
Albany 7, New York,

and

WILLIAM R. BRENNAN,
Counsel Designated to Conduct
the Proceedings,
806-808 Morgan Building,
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Buffalo, New York.